**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DANIEL RAMOS** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,047,141 |
| **FRANCO ROOFING** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **UNKNOWN** | ) | |
| Insurance Carrier | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

## ORDER

Claimant requested review of the July 23, 2012, Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on December 4, 2012.

### APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Paul M. Kritz, of Coffeyville, Kansas, appeared for respondent. David J. Bideau, of Chanute, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board the parties stipulated that claimant was an employee of respondent. Additionally, the Fund acknowledged it was no longer disputing the finding that claimant's average weekly wage on the date of accident was $500. Respondent agreed the record contained no contradictory testimony regarding claimant's average weekly wage on the date of the accident. The parties stipulated that respondent was uninsured for workers compensation purposes on the date of accident. However, the question of respondent's ability to pay for claimant's workers compensation benefits remained as an issue before the Board. Finally, respondent's attorney advised the Board

that he had been advised his client, Mr. Franco, had been deported to Mexico and he could no longer contact or locate Mr Franco.[1]

## ISSUES

The Administrative Law Judge (ALJ) found claimant had sustained his burden of proof of personal injury by accident arising out of and in the course of his employment and awarded claimant a 29 percent permanent partial functional disability to the right upper extremity at the forearm. He found claimant had failed to prove injury to his back, left upper extremity and thoracic spine. Claimant was awarded unauthorized medical compensation up to $500, less amounts previously paid. The ALJ assessed responsibility of the Award against respondent stating there was no evidence that respondent is uninsured or insolvent. The ALJ found no statutory authority to order the Fund to pay the benefits awarded.

Claimant argues that he is permanently and totally disabled from performing substantial and gainful employment, and the Board should modify the Award to reflect this disability. In the alternative, claimant argues that he has proven that he suffered a permanent injury to his thoracic spine, which would entitle him to a work disability of 95.5 percent. Claimant argues the Board should modify the Award accordingly and the Workers Compensation Fund should be held liable for payment of the benefits.

Respondent concurs with the findings of the ALJ and defers to the Workers Compensation Fund regarding the presentation of all other issues.

The Workers Compensation Fund contends the Award should be affirmed as claimant failed to prove that respondent met the requisite payroll to be subject to the Workers Compensation Act under K.S.A. 44-505(a). In the alternative, if the Board determines the Fund is liable, the Fund argues that claimant's injury did not arise out of and in the course of his employment, contending claimant was injured at home. The specific issues before the Board are as follows:

1. Did respondent have a total gross annual payroll for the year preceding the accident, or for the current year, which exceeds $20,000.00, sufficient to require application of the Kansas Workers Compensation Act to this matter?

2. Did the ALJ err in failing to find claimant was permanently and totally disabled?

3. If claimant is not permanently and totally disabled, what is the nature and extent of claimant's injuries and disability?

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[1] See K.S.A. 44-532a.

4. What, if any, is the liability of the Kansas Workers Compensation Fund?

5. Is claimant entitled to additional temporary total disability compensation (TTD) and if so, how much, for what dates, and how much has respondent paid to date?

## FINDINGS OF FACT

Claimant began living illegally in the United Stated in 2005. Claimant is unable to read or speak English. Before claimant came to work for respondent he worked for an ice cream company in Mexico. He also worked for an export company, a candy company and a construction company.

Claimant began working for respondent, Franco Roofing, in August 2007, but gave inconsistent information to various sources regarding his employment.[2] Claimant testified that there were between four and six people on respondent's roofing crew. Some of the people claimant worked with were family members of the owner of the company. Claimant was paid by the square, was paid in cash and made between $400 and $600 a week. He doesn't know what the other workers were making. Respondent provided the equipment and supplies necessary to complete the jobs. Respondent set up the jobs and instructed the crew on when to show up for work and how the work was to be completed.

Claimant testified that on July 7, 2009, while working for respondent, he suffered an injury after falling off a roof. He described falling 12 feet, face first, landing on his right hand after bracing his arms for impact. He complained of pain in his right hand/arm, back and left elbow. Claimant was taken to the emergency room in Coffeyville, Kansas, and x-rays were taken of his left elbow, right wrist, both knees and the left leg. The x-rays indicated claimant sustained fractures in both his right and left upper extremities. Dr. Maxime Coles, an orthopedic surgeon, operated on claimant's right wrist on July 15, 2009. Dr. Coles also provided claimant with treatment for the pain complaints in his left upper extremity at the elbow. Claimant was released on March 20, 2010. Claimant did not work from July 7, 2009 to March 20, 2010, while he received medical treatment. Claimant has been unsuccessful in finding another job.

Claimant testified that he can sit for about an hour and half before the pain in his mid-back increases. Claimant can stand for about an hour before he has increased pain in his mid-back. He denies any prior injuries to his back.

Claimant testified that respondent paid $200 of his medical expenses. Mr. Franco, respondent's owner, did not testify under oath in this matter. He did, however, make several comments on the record at the regular hearing, acknowledging that he was paying some of claimant's medical expenses. At the regular hearing, Mr. Franco commented that

[2] ALJ Award (July 3, 2011) at 4 (footnote No. 1).

"I went to the hospital and told them I am only going to pay so much money at the time and then I just haven't been working really much. They may send it to collection but I am going to take care of that deal."[3] Mr. Franco did not explain what he meant by "that deal". These on the record comments were made without objection and appear to be statements against interest made by Fr. Franco, respondent owner.

Mr. Franco also told the court that he had made TTD payments when ordered and stopped paying when claimant was released to return to work. The parties were told by the ALJ to "figure that out".[4] Both claimant and respondent, in their submission letters to the ALJ, argue that respondent has only paid a total of $200 in TTD to claimant, representing one week of partial benefits. The Fund argues in its submission letter that $200 per week of TTD was paid for the period from July 7, 2009 through March 20, 2010, when claimant was released to return to work by Dr. Coles, citing the on record comments of Mr. Franco. The Order of ALJ Klein dated March 5, 2010, required TTD to be paid at the weekly rate of $200. However, claimant's average weekly wage was found by the ALJ to be $500. This would calculate to a weekly TTD rate of $333.35. The ALJ, in the calculations on page 11 of the Award, allows a credit of $200, representing a single payment of TTD by respondent.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on October 12, 2009. Claimant's complaints at that time were loss of motion of the fingers on his right hand; stiffness of the right elbow; pain in the left elbow with difficulty lifting; and pain in the left wrist when trying to push himself up from a height.

Dr. Prostic examined claimant and found him to have some tenderness at T6 with ache extending backward. There was no mention in claimant's medical records contemporaneous with the accident of an injury to the thoracic spine. Dr. Prostic testified that since claimant had both arms and legs x-rayed at the ER, he found it hard to imagine having problems with all four extremities and not having some potential involvement of the spine.[5] He noted that claimant's right forearm was in a short arm cast which limited his ability to flex his MP joints or to extend his thumb. Dr. Prostic found significant restriction of rotation of the forearm, and some prominence of synovium over the dorsum of the lunate but no other obvious abnormality.[6]

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[3] R.H. Trans. at 8.

[4] *Id.* at 7.

[5] Prostic Depo. at 29.

[6] *Id.*, Ex. 1 at 2 (Oct. 12, 2009 report).

Dr. Prostic opined that claimant sustained injury to several areas in the fall. He had good healing of the left elbow fracture; the appearance of predominately healed comminuted fracture of the distal right radius; the appearance of injury to the distal radioulnar joint; and suspected injury at the left wrist to the ligaments connecting the lunate and triquetral bones. He determined all to be due to claimant's fall at work on July 7, 2009. Dr. Prostic suggested claimant remove the forearm cast and begin physical therapy to try and restore motion to the right upper extremity. He opined that arthroplasty of the distal radioulnar joint would most likely be required in the future and he found claimant to be unable to return to gainful employment at the time of the examination.[7]

Dr. Prostic met with claimant again on April 16, 2010, after claimant had received additional treatment. Claimant had received physical therapy for both upper extremities and, on March 20, 2010, was judged to be at maximum medical improvement by Dr. Coles. Claimant's greatest area of concern at this time was his right wrist. He continued to have loss of motion and weakness of grip. Claimant also had some hypersensitivity of the index and long fingers with some clicking and popping; and continued to have pain in the thoracic spine, aggravated by activity and intermittent stiffness of the left elbow.[8]

Claimant continued to have midline tenderness at T6, pain extending beyond neutral and at the extremes of lateral bend to each side and diffuse mild tenderness about the wrist. Claimant had good range of motion of the elbow without crepitus. At this visit x-rays of the thoracic spine were taken. No abnormalities were found.

Dr. Prostic continued to opine that claimant sustained injuries in a fall on or about July 7, 2009, during the course of his employment. He noted claimant's comminuted fracture of the right wrist was healed with limited motion and grip; the fracture of the left radial head was healed with minimal residual symptoms; and that claimant had a non-specific injury to his thoracic spine. Dr. Prostic opined that if claimant's wrist symptoms increased he would need an MRI with contrast to check the integrity of his triangular fibrocartilage complex.[9]

Dr. Prostic rated claimant with a 5 percent permanent partial impairment to the body as a whole for the thoracic spine, a 20 percent impairment to the right upper extremity, and a 5 percent impairment to the left upper extremity for a combined impairment of 19 percent to the body as a whole on a functional basis.[10] At his deposition, Dr. Prostic changed his

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[7] *Id.*, Ex. 1 at 2-3 (Oct. 12, 2009 report).

[8] *Id.*, Ex. 2 at 1 (Apr. 16, 2010 report).

[9] *Id.*, Ex. 2 at 2 (Apr. 16, 2010 report).

[10] *Id.*, Ex. 2 at 2-3 (Apr. 16, 2010 report).

rating to 22 percent to the right forearm for the right wrist injury. He did not change his opinion of a 5 percent impairment to the left arm above the elbow.[11]

Dr. Prostic opined that claimant was unable to return to work that required forceful or frequent repetitious gripping or twisting with the right hand.[12] Dr. Prostic opined that, based on the report submitted by Karen Terrill and knowing the problems with claimant's upper extremities and spine, claimant had suffered a task loss of 91 percent, with claimant having lost the ability to perform 21 of 23 tasks. Dr. Prostic ultimately found claimant to be essentially totally disabled from gainful employment.[13]

At the request of the attorney for the Fund, claimant met with board certified neurological surgeon Paul S. Stein, M.D., for an examination on January 13, 2011. At that time, claimant had chief complaints of constant right wrist pain, aggravated by activity and with a pain level of 3-4 out of 10; constant left elbow pain, aggravated by activity and with a pain level of 2-4 out of 10; constant numbness and tingling in the right second and third fingers; difficulty hold objects with the right hand; and pain in the mid to upper back without radiation, aggravated by prolonged walking, standing, and sitting. The pain limited his ability to walk more than 4 blocks.[14]

Dr. Stein examined claimant and opined that claimant sustained a fracture at the right wrist and a radial head fracture at the left elbow when he fell at work on July 7, 2009, and that those fractures were treated orthopedically and healed. He also noted that claimant discussed some upper-mid back pain, which claimant reported began two to three months after the accident and was first documented in the October 12, 2009, medical report of Dr. Prostic. There was no indication of any examination or treatment of the back. Claimant acknowledged that he did not discuss his back pain with the physical therapy professionals who were helping treat him. Dr. Stein did not measure the range of motion in claimant's back. He found claimant to be at maximum medical improvement for the back.[15]

For claimant's right hand injury, Dr. Stein found claimant to have 5 percent impairment to the right upper extremity at the hand for sensory involvement of the median nerve. For claimant's right wrist injury, Dr. Stein found claimant to have a 2 percent impairment to the upper extremity for decreased extension, a 2 percent impairment for

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[11] *Id.* at 28.

[12] *Id.* at 16.

[13] *Id.* at 17-18.

[14] Stein Depo. (Nov. 14, 2011), Ex. 1 at 2 (Dr. Stein's Jan. 13, 2011 IME report).

[15] *Id.*, Ex. 1 at 5 (Dr. Stein's Jan. 13, 2011 IME report).

decreased flexion and a 2 percent impairment for decreased ulnar deviation for a combined right upper extremity impairment of 6 percent. For decreased right hand grip strength he found claimant to have a 20 upper extremity percent impairment. Dr. Stein combined the right hand and wrist impairments for a 29 percent impairment to the right upper extremity. He went on to find claimant unable to engage in work activity requiring a firm and constant right handed grasp. He also stated work activity requiring frequent repetitive movement of the right hand and wrist should be avoided. He felt those were permanent restrictions.[16]

For the left elbow, Dr. Stein found claimant sustained a fracture of the radial head, which healed. He had full range of motion of the elbow without crepitus. He found no permanent impairment of function of the left elbow or left upper extremity.[17]

For the upper back, Dr. Stein found no documentation of back a injury and the physical findings involved only complaints of tenderness to palpation without guarding. He found claimant to have 0 percent impairment under DRE thoracolumbar category I of the *Guides*, 4th edition.[18] He opined that claimant is cleared to work if there is gainful employment available within his restrictions.[19] He found claimant to have a 0 percent task loss at this time.

In his December 28, 2011, report Dr. Stein opined that claimant's testimony at the regular hearing did not alter his opinion. Dr. Stein did have the opportunity to review the vocational assessment of Dan Zumalt and opined claimant could no longer perform 12 out of 26 tasks for a 46 percent task loss.

Dr. Stein, cited from a medical record from the Coffeyville Regional Medical Center on July 7, 2009, which indicates claimant suffered an injury while working at home on that date. However, no other medical report in this record contains such a history of accident and claimant was never questioned regarding that alleged accident. Additionally, the actual medical records from the Medical Center were never placed into evidence in this matter.

At the request of the attorney for the Fund, claimant met with Dan Zumalt, a vocational rehabilitation counselor, who opined claimant was not able to perform any of his work tasks from the last 15 years based on the impact upon his right hand. He testified

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[16] *Id.*, Ex. 1 at 5 (Dr. Stein's Jan. 13, 2011 IME report).

[17] *Id.*, Ex. 1 at 5-6 (Dr. Stein's Jan. 13, 2011 IME report).

[18] *Id.*, Ex. 1 at 6 (Dr. Stein's Jan. 13, 2011 IME report).

[19] *Id.* at 14-15.

that while there are skills that would be transferrable, they would be contraindicated by the upper extremity restrictions.

Mr. Zumalt opined that based on Dr. Stein's restrictions, claimant has a 46 percent task loss in terms of grasping activities. He found claimant had no task loss based on the opinion of Dr. Prostic.

In terms of claimant's ability to earn a comparable wage, Mr. Zumalt opined claimant could perform entry-level type work making $7.25 an hour until such time as he could move into a field where he could acquire more skills within his restrictions.

At the request of claimant's attorney, Karen Crist Terrill met with claimant for vocational assessment by telephone and with the aid of an interpreter, on October 6, 2010.

Ms. Terrill opined that claimant is not able to perform any work from his past work history with the physical limitations placed on him by Dr. Prostic. Ms. Terrill opined that claimant does not possess any transferrable job skills and claimant's inability to speak and understand English in the open labor market is a limiting factor in his finding employment. Ms. Terrill testified that, considering the totality of the circumstances, claimant is permanently and totally disabled and is unable to engage in any type of substantial, gainful employment as a result of his work injury at Franco Roofing on or about July 7, 2009.

Ms. Terrill identified 23 prior tasks from claimant's work history over the last 15 years, prior to this accident, and of those tasks, claimant can no longer perform 21, resulting in a 91 percent task loss based on the restrictions of Dr. Prostic for the right hand. Ms. Terrill found claimant to have a 100 percent wage loss since he is not working.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[20]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[21]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[20] K.S.A. 44-501 and K.S.A. 44-508(g).

[21] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[22]

K.S.A. 44-505(a)(2) states:

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
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> . . .
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> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

Respondent and the Workers Compensation Fund argue that respondent did not meet the gross annual payroll limits of the statute. Claimant testified that he was making between $400 and $600 dollars per week, working from August of 2007 to the date of accident in July 2009. The Fund contends claimant's actual dates of employment are inconsistent and uncertain in this record. It is true, as pointed out by the ALJ in his Award, that this record contains inconsistencies regarding claimant's alleged dates of employment. However, claimant's testimony is consistent with several of the entries. The ALJ found, and the Board agrees, that claimant started working for respondent in August 2007 and continued as a full-time employee through the date of accident. Claimant's average weekly was determined by the ALJ to be $500. The Board agrees. This would calculate to an annual payroll for the year 2008 of $26,000. This easily meets the statutory requirements of K.S.A. 44-505. The Kansas Workers Compensation Act applies to this situation and the Award on that issue is affirmed.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, *et seq*.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or

[22] K.S.A. 44-501(a).

> origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[23]

The Fund contends claimant suffered an injury at home rather than at work. The support for this argument comes from comments made by Dr. Stein, citing from a medical record from the Coffeyville Regional Medical Center on July 7, 2009, which indicates claimant suffered an injury while working at home on that date. However, no other medical record contains such a history of accident and claimant was never questioned regarding that alleged accident. Additionally, the actual medical records from the Coffeyville Regional Medical Center were never placed into evidence in this matter. Therefore, it is difficult if not impossible, to either verify or dispute the truth of that hearsay evidence. The history provided to the various health care providers in this matter is more consistent with claimant's testimony describing a work-related accident on July 7, 2009. No witness testified in this matter to contradict claimant's description of the accident. The allegations of an intervening or non-work accident at home are not supported by this record. The Board finds that claimant suffered a work-related accident on July 7, 2009. The finding by the ALJ on this issue is affirmed.

K.S.A. 2000 Furse 44-510c(b)(2) states:

> Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant requests TTD from the date of accident on July 7, 2009 through his release to return to work on March 20, 2010. ALJ Klein ordered TTD in his March 5, 2010, preliminary order. Claimant testified at the regular hearing that he was released to return to work by Dr. Cole's effective March 20, 2010.[24] The Board affirms the award of TTD from July 7, 2009 to March 20, 2010, a period of 36.57 weeks at the compensation rate of $333.35, minus any amounts previously paid. The finding by the ALJ that Mr. Franco paid one week of TTD benefits at the weekly rate of $200 is also affirmed.

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[23] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[24] R.H. Trans. at 22.

K.S.A. 2000 Furse 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[25]

The Board must next determine the nature and extent of claimant's injuries and disability, if any. The record contains two medical opinions regarding claimant's functional impairment. Dr. Prostic rated claimant's right and left upper extremities and his thoracic spine. However, examinations of the left upper extremity and thoracic spine were essentially normal. Additionally, claimant's first medical record regarding the thoracic spine was Dr. Prostic's report of October 12, 2009. Claimant told Dr. Stein that he did not begin to experience back pain for two to three months after the accident. Dr. Stein was unable to relate the back complaints to the accident, in part, due to the delay in symptoms. The Board finds the medical opinions of Dr. Stein to be more persuasive. The award of a 29 percent functional impairment to the right upper extremity at the level of the forearm, based upon the opinion of Dr. Stein, is affirmed. As claimant's award is limited to a scheduled injury, no permanent partial general (work) disability is appropriate.[26]

K.S.A. 2000 Furse 44-532a states:

> (a) If an employer has no insurance to secure the payment of compensation, as provided in subsection (b)(1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, **or such employer cannot be located and required to pay such compensation**, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith. (Emphasis added)

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[25] K.S.A. 44-510e(a).

[26] See K.S.A. 44-510d(b).

> (b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. Such action shall be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into.

The ALJ denied the assessment of benefits in this matter against the Fund, finding that there was no evidence that respondent was uninsured or unable to pay benefits. However, the parties have stipulated that respondent was uninsured for workers compensation purposes. Additionally, at oral argument to the Board, the attorney for respondent stated that he had been advised that Mr. Franco, the owner of respondent had been deported and further, he could no longer locate his client.[27] The Board finds, as the respondent/employer cannot be located and required to pay compensation in this matter, the award in this matter shall be assessed against the Fund. Should this respondent be subsequently located, the Fund's statutory right to recovery remains.

## CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed with regard to the liability of the Kansas Workers Compensation Fund, but affirmed in all other regards.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 23, 2012, is reversed in that the award shall be assessed against the Kansas Workers Compensation Fund, but affirmed in all other regards.

[27] See: *Olds-Carter v. Lakeshore Farms, Inc.*, 45 Kan. App. 2d 390, ___ P.3d ___ (2011).

**IT IS SO ORDERED.**

Dated this _____ day of December, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Paul M. Kritz, Attorney for Respondent
pmkritz@sbcglobal.net

David J. Bideau, Attorney for the Kansas Workers Compensation Fund
djb@bideaulaw.com

Bruce E. Moore, Administrative Law Judge